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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1971

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No. 71-879

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HEUBLEIN, INC.,

*Appellant,*

v.

SOUTH CAROLINA TAX COMMISSION,

*Appellee.*

ON APPEAL FROM THE SUPREME COURT  
OF SOUTH CAROLINA

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**BRIEF OF THE DISTILLED SPIRITS INSTITUTE  
AS AMICUS CURIAE**

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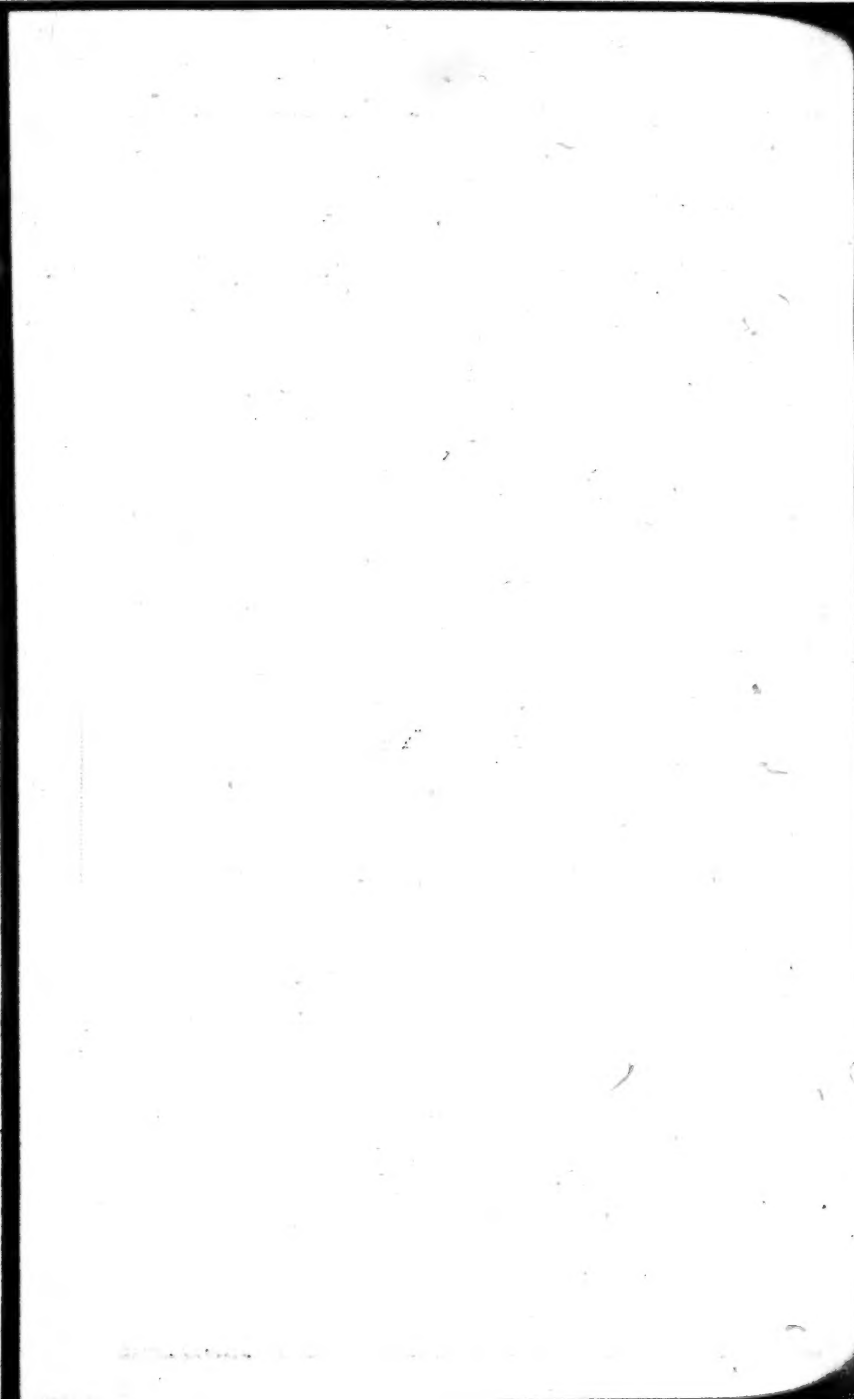
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## I. Interest of Amicus Curiae

This brief is submitted, with the written consent of both parties, by the Distilled Spirits Institute in support of the Jurisdictional Statement of the Appellant. The Distilled Spirits Institute is a trade association having its principal office at 1132 Pennsylvania Building, Washington, D. C. 20004. It counts among its members most of the manufacturers of distilled spirits in the United States.

This case involves the interpretation of Public Law 86-272 (The Interstate Income Tax Act; 15 U.S.C. §381; Jurisdictional Statement, A. 30-32) which prohibits the imposition of state income taxes on interstate commerce conducted by businesses which limit their business activities in the taxing state to those covered by the statute.

The Supreme Court of South Carolina has in this case held that the taxpayer, Heublein, by virtue of its compliance with South Carolina's Alcoholic Beverage Control Laws, has been placed outside the protection of the Federal statute.

States have, under the Twenty-first Amendment, the power to regulate traffic in alcoholic beverages within their borders. The claim that the states could legitimately use this regulatory power to extend their taxing power over interstate commerce in spite of Public Law 86-272 was rejected in *Oklahoma Tax Comm'n v. Brown-Forman Distillers Corp.*, 420 P. 2d 894 (Okla. 1966). The Supreme Court of South Carolina, by its decision from which this appeal is taken, threatens to resuscitate this claim.

In 1970, 212,257,376 tax gallons of distilled spirits were produced in the United States.\* The Institute estimates that the bulk of this production is sold in interstate commerce\*\*, and that Institute members account for the greater proportion of such commerce.\*\*\*

\* Distilled Spirits Industry 1970 Annual Statistical Review p. 8.

\*\* 99% of whiskey production, for example, occurs in six states, which, however, account for only about 13% of distilled spirits consumption (based on figures taken from Distilled Spirits Industry 1970 Annual Statistical Review).

\*\*\* In South Carolina, for example, 1,754,562 cases of distilled spirits were shipped to wholesalers. Of these, 1,259,748 cases, or 71.8%, were shipped by Institute firms.

Consequently, resolution of the direct conflict between the highest courts of Oklahoma and South Carolina is of vital interest to the Institute and its members. Liabilities for state income taxes and the cost of compliance with state income tax laws constitute a substantial expense of conducting interstate business, an expense especially burdensome to small and medium sized businesses. The uncertainty as to the nature and extent of this liability and expense, engendered by the decision below, adds to this burden.

Moreover, the Institute and its members are vitally interested in how this conflict is resolved. The findings of Congress that the diverse income tax laws of the many taxing jurisdictions in this country constituted a heavy burden on interstate commerce apply with undiminished vigor to the distilled spirits industry. The Institute believes it to be of paramount importance that the applicability of Public Law 86-272 to all its members in each of the states be upheld, and that the decision of the Supreme Court of South Carolina in this case be reversed. The interest of the Institute in the question presented on this appeal is, therefore, direct and substantial.

## **ARGUMENT**

### **A. Heublein has not engaged in activities in South Carolina which remove it from the protection of Public Law 86-272.**

Public Law 86-272 provides that a business which limits its activities in a state to "the solicitation of orders by such [business], or [its] representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State" are exempt from income taxation in that state. [Public Law 86-272, 15 U.S.C. §381; Jurisdictional Statement, A. 30-32.]

For the years in question, Heublein conducted its business in South Carolina through a single representative in South Carolina, whose primary activity was promoting Heublein products [Order of the Court of Common Pleas (hereinafter "Order"); Jurisdictional Statement, A. 22, 23]. Infrequently, this representative would forward an order for Heublein products to the wholesaler with which Heublein dealt in South Carolina. In the main, however, orders for Heublein products were received directly by this wholesaler from customers in South Carolina. [Order; Jurisdictional Statement, A. 23]. All orders were forwarded to Heublein in Hartford, Connecticut, for acceptance or rejection. Products were shipped pursuant to accepted orders from Hartford, Connecticut, to Heublein in care of its representative at the wholesaler's warehouse in Columbia, South Carolina. [Order; Jurisdictional Statement, A. 23, 24.]

Application of the statutory language to these facts seems straightforward. The orders forwarded by the wholesaler in South Carolina to Heublein in Hartford are clearly "filled by shipment or delivery from a point outside the State." Any possible ambiguity in this clear statutory language is immediately dispelled by its legislative history. The Report of the Senate Committee on Finance states that:

"... if the only business presence within the State by a person engaged in interstate commerce is the solicitation by his salesmen of orders for sales of tangible personal property and the orders are sent to an office out of the State for approval or rejection, and if the order is approved, it is filled by shipment or delivery from a stock of goods, warehouse, plant, or factory located out of the State, the net income tax of the State or political subdivision thereof on income derived within the State by such person from interstate commerce may not be imposed.

The immunity provided by subsection (a) of section 1 of the bill will not be available to a person, however, if the business activities by salesmen within the State on behalf of such person are not limited during the taxable year to the solicitation of such

orders or of orders described in paragraph (2) of subsection (a), or both. The provisions of subsection (a) of section 1 of the bill will not be available to grant immunity to a person where the orders are filled by a shipment or delivery from a stock of goods, warehouse, plant, or factory maintained by the person within the State." S. Rep. No. 658, 86th Cong., 1st Sess. 6, 7, 1959.

Congress meant to protect an out-of-state businessman who shipped from a stock of goods maintained out of state, leaving unprotected the businessman who maintained his goods in the state. This is the distinction embodied in the statute, and it applies directly to Heublein's situation. Heublein's stock is maintained in Connecticut and can only get to South Carolina by "shipment . . . from a point outside the State."

In spite of this, the South Carolina Tax Commission argued in the Supreme Court of South Carolina that South Carolina's Alcoholic Beverage Control laws\* required delivery and sale to take place in South Carolina, and "therefore, the Interstate Income Law, Public Law 86-272, applicable when delivery is made from a point outside the State, does not apply to grant immunity from South Carolina taxes." [Brief of South Carolina Tax Commission in the Supreme Court of South Carolina, pp. 8, 9.]

This argument is totally beside the point, since the statute speaks in terms of "shipment or delivery" (emphasis added). If the shipment is from a point outside the state, it does not matter how or where delivery occurs. Indeed, when shipment is from outside the state, it is quite likely delivery will occur within the state. If Congress wished to protect only businesses where shipment *and* delivery occurred outside the state, it was open to it to do so.

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\* South Carolina Code of Laws (1962) §4-131 to §4-150. [Jurisdictional Statement, A. 32-40.]

The Supreme Court of South Carolina apparently misconstrued the Federal statute to require that both shipment and delivery take place outside the state, for it said:

*"Public Law 86-272 is applicable when delivery is made from a point outside the State and is inapplicable to sales and delivery consummated within the State."*

It is conceded that the sales here involved were made in accordance with the State statutory requirements. They were, therefore, intrastate transactions and beyond the reach of Public Law 86-272." [Jurisdictional Statement, A. 21.] (Emphasis added.)

Alternatively, the Supreme Court of South Carolina grounded its decision on its characterization of the transaction between Heublein and the wholesaler as a "sale" occurring in South Carolina under South Carolina law.

But the Court's characterization under state law of the transaction between Heublein's representative and the wholesaler is simply irrelevant for the purposes of Public Law 86-272. Whether local law determines the scope of the statute is a federal question to be determined by ascertaining the intent of Congress. *R.F.C. v. Beaver County*, 328 U. S. 204, 208 (1946). The language and legislative history of Public Law 86-272 make it abundantly clear that Congress did not intend that the application of the statute turn on such questions of local law. Congress made especially plain its dissatisfaction with any test dependent upon the local law of sales. Speaking of tax apportionment, a problem whose unsatisfactory resolution by the states provided substantial impetus to the enactment of Public Law 86-272, the Committee Report states:

*"The committee understands that the formulas currently in use are complex, that even within the formulas the meaning of the basic words are inexact; and that for example, many of the 35 income tax States used a different definition to cover the term 'sale.' It understands that a 'sale' may be considered to have taken place, according to these definitions, in any of these locations: In the place where*

the buyer and seller met; in the place where the goods were manufactured; in the place where the goods were stored; in the place where the transaction was finally approved; in the place where the selling company was domiciled; in the place where the salesman's office was located; *or in the place to which the goods were shipped.* This lack of uniformity creates the possibility that each of a number of different States may regard the same sale as having occurred in it, depending upon the particular definition of 'sale' under its own tax laws. If each of several different States treat the same sale as attributable to it because of its own definition of 'sale' in the State, it is apparent that income from the same sale may be attributed to each of the States under whose law the same sale is to be attributed." S. Rep. No. 658, 86th Cong. 1st Sess. 3, 4 (1959). (Emphasis added.)

There could be no more decisive rejection of the point-of-sale test in the context of national tax policy.

Yet the decision of the South Carolina Supreme Court not only employs this rejected test, but employs it to avoid application of the statute, thus reaching a result which ironically enough, emasculates Congressional policy by use of the very test whose application by the states to the problem of income apportionment originally prompted this remedial legislation. This interpretation of the statute, if condoned, means that Congress will never be able to establish a nationally uniform policy of interstate income taxation, for the states, by a bootstrap application of their own law of sales, may hold that their own laws of income taxation apply.

The slender factual underpinning of the decision below emphasizes the ease with which this mode of construction can completely nullify the Federal statute. In *every* case where a person in one state ships goods to a person in another state, local law in the second state can provide that delivery and sale occur there. In the instant case, this result is achieved through interpretation of South Carolina's alcoholic beverage control provisions, but it is quite appar-

ent that this is not the only means open to a state to find a sale or delivery occurring within its borders. This method of statutory interpretation bids fair to bring in its train a return to the chaotic conditions which lead to Public Law 86-272. The history of state taxing provisions, then and now, demonstrates that the states are unwilling or unable to resist expanding their taxing power when they can. There is no reason to suppose that states, feeling pressed for revenue, will refrain from finding a taxable sale or delivery in every constitutionally permissible instance, thus nullifying the statute *in toto*. And it is no answer to suppose that some or all of the states may refrain from extending their taxing power for a time, even for a long time. Congress enacted Public Law 86-272 precisely because it was dissatisfied with the results of leaving this choice to each state.

**B. South Carolina's regulatory laws may not be used to frustrate national interstate income tax policy.**

Even indulging in the assumption that Heublein's activities in South Carolina were sufficient to take it out of the area protected by Public Law 86-272 will not save the decision below. As that decision makes clear, the Supreme Court of South Carolina held that because of Heublein's compliance with South Carolina's regulatory statutes, Public Law 86-272 did not apply:

"It is conceded that the sales here involved were made in accordance with the State statutory requirements. They were, therefore, intrastate transactions and beyond the reach of Public Law 86-272." [Jurisdictional Statement, A. 21.]

Indeed, the exact argument made to that Court was that "The legislative intent [was] to require all importers of alcoholic liquors to pay income taxes." [Brief of the South Carolina Tax Commission in the Supreme Court of South Carolina, p. 10.] The net result is that whatever the standards embodied in the Federal statute, and whatever the

activities of Heublein (or any out-of-state distiller), South Carolina may simply enact legislation requiring some activity which its courts may interpret as beyond that protected by the Federal law, and then levy its income tax. The result is a procedure which guarantees that, should South Carolina choose, Congress will never be able to apply a national interstate income tax policy to distillers doing business in South Carolina, or indeed in any state which follows South Carolina's example.

The resulting inapplicability of Public Law 86-272 will not be the result of any substantial change in the business activities of distillers in South Carolina, but will rather turn upon an empty judicial conceptualism. The record in this case amply demonstrates the insubstantiality of the changes occasioned in Heublein's South Carolina activities by South Carolina's Alcoholic Beverage Control Laws. [Order; Jurisdictional Statement, A. 22-24.] Yet it is upon these slight changes, amounting in effect to a change in the form of the shipping documents accompanying Heublein's goods shipped into South Carolina, that the decision of the Supreme Court of South Carolina that such were "therefore, intrastate transactions and beyond the reach of Public Law 86-272" must rest.

The purpose of Public Law 86-272 was to protect interstate businesses from state income taxation. The legislative history reveals that Congress was deeply concerned over the chaotic conditions caused by the multiplicity of state income taxation provisions, and the broad language upholding state taxing authority contained in *Portland Cement Co. v. Minnesota* 358 U. S. 450 (1959) then recently decided by this Court. As the Committee Report states: "Your committee understands that this apprehension [over the broad language of *Portland Cement*] is due in large part to the burdens of compliance an out-of-State company may be subjected to in ascertaining with respect to every State in which such sales are made, first, the company's 'taxable income' prior to any apportionment for the purposes of the

particular State's tax law, and, secondly, the portion of the company's total 'taxable income' that is 'properly apportioned' to the taxing State under the apportionment formula used by that particular State." S. Rep. No. 658, 86th Cong. 1st Sess. 3 (1959). The Committee noted that the prevailing lack of uniformity among the states made the cost of compliance high, and that the differing standards among the large number of jurisdictions then imposing an income tax (35 States and 8 cities) raised the possibility of double taxation (*id.* at 3). Public Law 86-272 was enacted to alleviate those burdens upon commerce.

The decision of the Supreme Court of South Carolina totally frustrates this policy with respect to a large segment of interstate commerce. Such a result deserves the closest scrutiny wherever it may occur. Such a result certainly ought not to be condoned by this Court when it is the product of a plan looking to just this end.

Moreover, the path of avoidance of the Federal statute now opened up will be quickly followed by other states seeking additional revenues. Indeed, the technique, if validated here, could be easily broadened in its application to cover any aspect of commerce wherein the state could gain a regulatory toehold by virtue of its police power. If this Court upholds this effort by South Carolina to do through purposeful indirection what it cannot do directly, the results for a nationally uniform policy of interstate income taxation will be disastrous.

**C. The Twenty-first Amendment does not sanction the imposition of state income taxes on interstate commerce in alcoholic beverages.**

The South Carolina Tax Commission argued to the court below that "As Public Law 86-272 relates to the taxation of foreign corporations or businesses and is directly related to the Commerce Clause . . . it must yield to the State's power under the Twenty-first Amendment as does the Commerce Clause." [Brief of the South Carolina Tax Commis-

sion in the South Carolina Supreme Court, p. 7.] This argument has been unequivocally rejected in this Court:

"To draw a conclusion . . . that the Twenty-First Amendment has somehow operated to 'repeal' the Commerce clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce clause had been *pro tanto* 'repealed', then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a contention would be patently bizarre and is demonstrably incorrect." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 331 (1964); *Cf. Dept. of Rev. v. James Beam Co.*, 377 U. S. 341 (1964) (upholding Congressional power under the Export-Import Clause); *Jameson & Co. v. Morganthau*, 307 U. S. 171, 173 (1939).

The view that the Twenty-first Amendment left Congress with no power over alcoholic beverages is admittedly difficult to maintain, for as was said in *Jatros v. Bowles*, 143 F. 2d 453 (6th Cir. 1944) (upholding power of Congress to set maximum retail liquor prices):

"Followed to its logical conclusion [the proposition that the Twenty-first Amendment had stripped the national government of all control over interstate commerce in alcoholic beverages], if valid, would mean that the federal government no longer has power to punish theft of intoxicants from interstate shipments of alcoholic beverages under the authority of the so-called Car Seal Act, nor to regulate or prohibit unfair trade practices in respect to such commodities through the Federal Trade Commission, nor to regulate tariffs through orders of the Interstate Commerce Commission, nor to prohibit unfair labor practices affecting commerce in intoxicants by brewers or distillers under authority of the National Labor Relations Act, 29 U. S. C. A. §151 et seq., nor to prescribe minimum wages or maximum hours for employees in such enterprises under authority of the Fair Labor Standards Act, 29 U. S. C. A. §201 et seq." (at 455).

The concept, of course, would extend far beyond this brief list and purport to sweep aside all the important and diverse measures Congress has taken pursuant to the power granted to it by the Commerce clause.

Moreover, the House and Senate debates which preceded Congressional submission of the Amendment demonstrate that no such effect was intended. Congress intended the second clause of the Amendment to protect the dry states through a retention of Federal power. As was said in an article read into the record by Senator Bingham, the clause was but a "restatement of the Webb-Kenyon law, already on the law books, which would write into the constitution the right of the dry states to have Federal protection against the importation of liquor".\*

While the clause gave to dry states the additional protection of Federal power to enforce their prohibitory legislation, it did not otherwise prevent interstate commerce in liquor. In the words of Senator Glass:

"In my own intrepertation of the resolution as I have presented it, there can be no consignee of intoxicating liquors in a dry State. Liquors may be shipped across a State in interstate commerce from one wet State to another wet State, but the resolution as I have drafted it prohibits the shipment of intoxicating liquors into a State whose laws prohibit the manufacture, sale, or transportation of liquors. So I have met the objection that we are undertaking to interfere with interstate commerce as between States which authorize the manufacture, transportation, and sale of liquors. . . . ".\*

But if South Carolina cannot maintain that the Twenty-first Amendment has repealed the Commerce clause totally, it is left to it to argue the equally questionable proposition that the Twenty-first Amendment has displaced the Com-

\* 76 Cong. Rec. 4228 (1933). This was a widely held view. See remarks of Senator Blaine, *id.* at 4140-41; Senator Borah, *id.* at 4170-72; Mr. Gibson, *id.* at 4526.

\*\* Remarks of Senator Glass, 76 Cong. Rec. 4219 (1933).

merce clause in matters of taxation. The history of the Amendment may be sifted in vain, however, for evidence that it was adopted to preserve or extend state taxing power. It is, on the other hand, fundamental to the policy embodied in the Commerce clause that Congress should have the power to regulate matters affecting interstate commerce. *Eg., Nat. Bellas Hess v. Dept. of Revenue*, 386 U.S. 753, 760 (1967). It was pursuant to its finding that the multiplicity of state income tax laws constituted a burden on commerce that Congress passed Public Law 86-272 (see discussion *supra*, pp. 8, 9). Where, as here, the state asserts its power to tax, there is no conflict between the Twenty-first Amendment and the Commerce clause. As the Supreme Court of Oklahoma said on similar facts: "No alcoholic beverage regulation is involved here. The general income tax assessments in question are not within the compass of the 21st Amendment." *Oklahoma Tax Comm'n v. Brown-Forman Distillers Corp.*, 420 P. 2d 894, 898 (Okla. 1966).

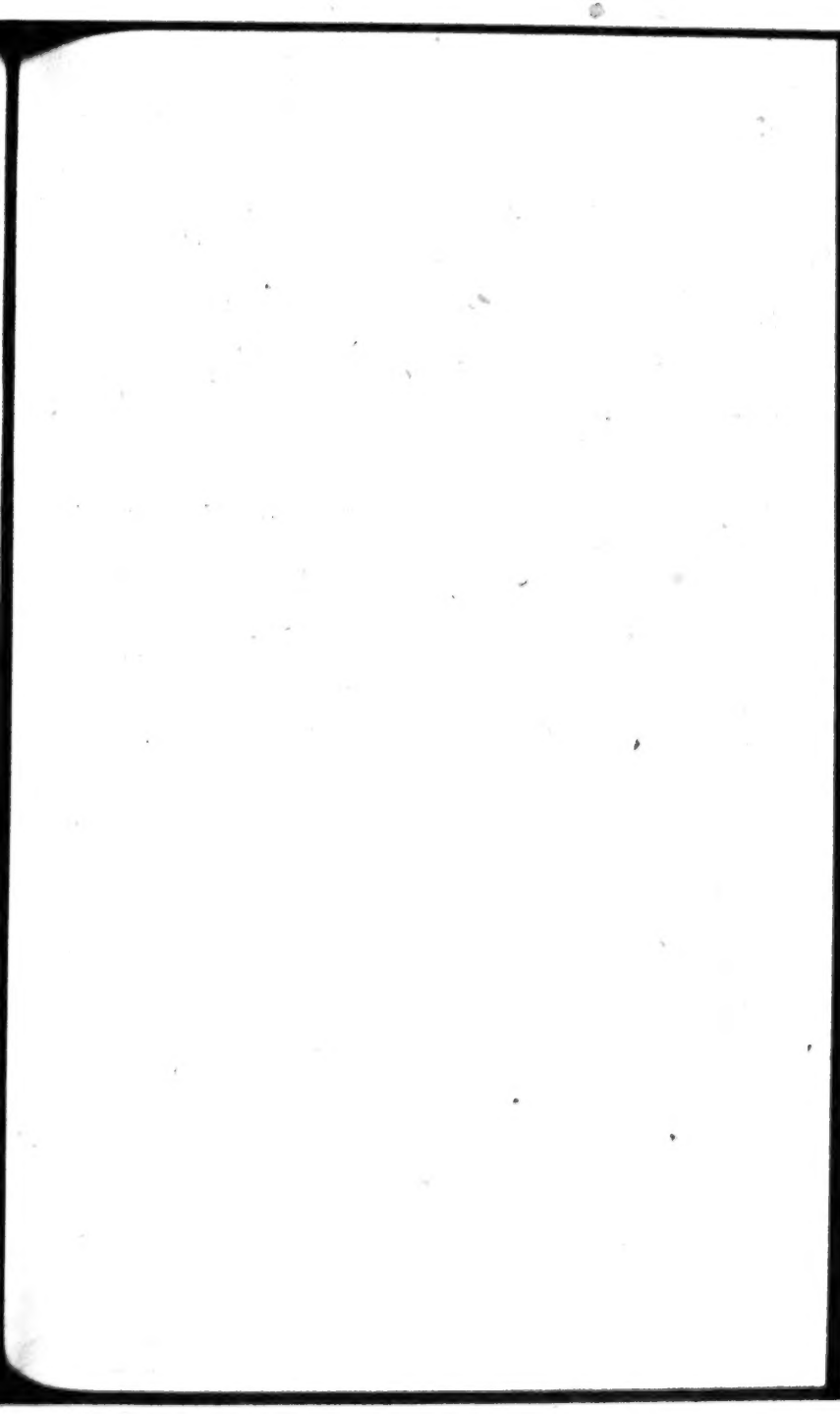
### Conclusion

For the foregoing reasons, this Court should note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

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# Supreme Court of the United States

OCTOBER TERM, 1971

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No. 71-879

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HEUBLEIN, INC., APPELLANT,

*against*

SOUTH CAROLINA TAX COMMISSION, APPELLEE.

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ON APPEAL FROM THE SOUTH CAROLINA SUPREME COURT

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## MOTION TO DISMISS

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The Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves the Court to dismiss the Appeal herein on the ground that the judgment of the Supreme Court of the State of South Carolina rests on an adequate nonfederal basis, and further, on the ground that the questions for which review is sought are so unsubstantial as not to need further argument.

## I

**THE STATE STATUTE INVOLVED AND THE  
NATURE OF THE CASE****A. The Statute**

This appeal questions the validity of the application of Section 65-222 (the South Carolina Corporation Income Tax Statute) and Sections 65-602 and 65-606 (the South Carolina Corporation License Tax Statutes) of the 1962 Code of Laws of South Carolina to Appellant. Appellant brings this appeal on the ground that said sections are repugnant to the Interstate Income Law, Public Law 86-272, 73 Stat. 555, 15 U.S.C., Section 381.

Section 65-222 provides for an income tax upon the net income of domestic corporations. It further provides for an income tax upon the net income of foreign corporations from business within the jurisdiction of South Carolina.

All corporations that are required to file income tax returns in South Carolina are required to also file an Annual Report. *Section 65-202 of the 1962 Code of Laws of South Carolina*. Section 65-606 of the Code subjects corporations that are required to file said report to license fees.

**B. The Proceedings Below**

Action was brought in the Court of Common Pleas for South Carolina by Appellant on February 19, 1969, to recover corporation income taxes and corporation license taxes. Appellant contended that the taxation by South Carolina was illegal as its activities within South Carolina did not exceed the minimum standards of Public Law 86-272. Appellant further contended that if its activities exceeded the minimum standards of Public Law 86-272, such were done under compulsion in compliance with the South Carolina Alcoholic Beverage Control Act, and that could not form the jurisdiction for taxation. The Court of Com-

mon Pleas upheld the contentions of the Appellant and the case was appealed to the South Carolina Supreme Court. In the Court's Opinion, filed September 22, 1971, the Supreme Court stated that the Twenty-first Amendment to the United States Constitution gave South Carolina the power to prescribe the conditions under which alcoholic liquors may be imported into South Carolina. It furthermore stated that the Alcoholic Beverage Control Act, adopted by South Carolina under the powers reserved by the Twenty-first Amendment, particularly Sections 4-131 and 4-150 of the South Carolina Code of Laws, provides that producers of alcoholic liquors, before shipping liquor into South Carolina, must be registered with the State and that a "producer representative" who is a resident of South Carolina must be appointed to accept delivery within the geographical bounds of South Carolina for the producer. Thereafter the producer, through the representative, is authorized to make an intrastate delivery of the liquors from within South Carolina to a licensed wholesaler within the State. The delivery must then be certified to the Tax Commission. Sale and delivery of alcoholic liquors by Appellant in compliance with the Act were held to be made "intrastate" as interstate sale and delivery are expressly precluded. Public Law 86-272 was therefore held to be inapplicable and the decision of the Court of Common Pleas was reversed.

## II

## ARGUMENT

## A.

The judgment of the South Carolina Supreme Court rests upon a determination that Appellant's activities within South Carolina were such to render Appellant liable for Income and License Taxes. The judgment of the Supreme Court is in fact based upon a nonfederal ground upon which this court should not exercise its jurisdiction of review.

The questions presented in Appellant's Jurisdictional Statement can be consolidated into the question: "Is the Appellant exempt from State taxation because of Public Law 86-272?" Public Law 86-272 provides that no state shall have the right to impose a tax on net income, or a tax measured by net income, on income derived within the state by a company if the only business activities within the state by or on behalf of such company are the solicitation of orders within the state for tangible personal property and the maintenance and operation within the state of a sales office. To qualify, all such orders must be sent outside the state for approval or rejection, and if approved, must be sent by shipment or delivery from a point outside the state.

The Supreme Court of South Carolina held that Appellant's activities in compliance with the Alcoholic Beverage Control Act of South Carolina were intrastate and were therefore beyond the minimum protection of Public Law 86-272.

This Court has consistently adhered to the principle that it will not review a judgment of a state court that is based upon an adequate and independent nonfederal ground even though a federal question is involved which may perhaps be wrongly decided. *Murdock v. Memphis*, 20 Wall 590; *Berea College v. Kentucky*, 211 U. S. 45, 53; *Fox Film Corporation v. Muller*, 296 U. S. 207. The Court's power

over a state judgment is therefore to correct the judgment to the extent that federal rights are wrongly adjudged.

The judgment of the Supreme Court of South Carolina was based solely upon a nonfederal finding that Appellant's activities within South Carolina were intrastate activities beyond the protection of Public Law 86-272. Appellant was thus adjudged to be subject to South Carolina taxation.

The appeal of *Clairol, Inc. v. Director, Division of Taxation*, was dismissed by this Court on April 19, 1971, Opinion No. 1367, for want of a substantial federal question. This Court refused to review the judgment of the Supreme Court of New Jersey, 57 N. J. 199, 270 A. (2d) 702, holding that Clairol was not exempted from New Jersey taxation by Public Law 86-272 because of the local activities within the State. Appellee therefore respectfully submits that its Motion to Dismiss should be granted as the basis for the dismissal of the Clairol appeal is presented again for review in the present case.

The Twenty-first Amendment to the United States Constitution reserves to a state exclusive right to control the flow of alcoholic liquors for delivery or use therein. Appellant transported alcoholic liquors for delivery or use within South Carolina, and in so doing complied with the Alcoholic Beverage Control Act of South Carolina, enacted under the authority of the Twenty-first Amendment. The State Supreme Court made a determination that Appellant's sale and delivery of alcoholic liquors within South Carolina, in compliance with said Act, were local activities beyond the protection of Public Law 86-272, thereby precluding its application. This judgment is based solely upon adequate and independent State grounds. Appellee therefore respectfully submits that the Court lacks jurisdiction to take this appeal and that the same should be dismissed.

**B.**

The judgment of the Supreme Court of South Carolina is based upon a determination that the conditions imposed by the South Carolina Alcoholic Beverage Control Act for importing alcoholic liquors into South Carolina for sale and use therein were within the powers reserved to the states by the Twenty-first Amendment to the United States Constitution, and that Appellant's voluntary compliance with this Act thereby subjected it to South Carolina Corporation Income and License Taxes. The issue of the power of the States over alcoholic liquors presents no substantial question not previously decided by this Court.

The judgment of the Supreme Court of South Carolina is based upon a finding that the South Carolina Alcoholic Beverage Control Act was adopted under the powers reserved to the states by the Twenty-first Amendment to the United States Constitution. Further, said judgment is based upon a finding that Appellant complied with the Act in its business of selling and delivering alcoholic liquors within South Carolina, thereby becoming amenable to the State income and license taxing statutes.

The Twenty-first Amendment to the United States Constitution provides that the transportation or importation of intoxicating liquors into any state for delivery or use therein in violation of its laws is prohibited. This Court has recognized the power of the states to regulate or prohibit the importation of alcoholic liquors as being practically unlimited, irrespective either of the commerce clause or the equal protection clause of the Constitution. *State Board of Equalization v. Young's Market Co.*, 299 U. S. 59; *Mahoney v. Joseph Triner Corp.*, 304 U. S. 401; *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U. S. 391; *Joseph S. Finch & Co. v. McKittrick*, 305 U. S. 395; *Ziffrin, Inc. v. Reeves*, 308 U. S. 132.

In several cases this Court has held that the states, having absolute power to prohibit the manufacture, sale, transportation or possession of intoxicants, could adopt a lesser degree of regulation rather than total prohibition. *Ziffrin, Inc. v. Reeves, supra*; *State Board of Equalization v. Young's Market Co., supra*.

In *Phillips v. City of Mobile*, 208 U. S. 472, an ordinance in the nature of a revenue act was upheld in validity as being within the police power of a state under the Wilson Act. This Court stated:

"The sale of liquors is confessedly a subject of police regulation. Such sale may be absolutely prohibited, or the business may be controlled and regulated by the imposition of license taxes, by which those only who obtain licenses are permitted to engage in it. Taxation is frequently the very best and most practical means of regulating this kind of business. The higher the license, it is sometimes said, the better the regulation, as the effect of a high license is to keep out from the business those who are undesirable, and to keep within reasonable limits the number of those who may engage in it."

In *United States v. Frankfort Distilleries*, 324 U. S. 293, this Court held that as a matter of constitutional law, the result of the Twenty-first Amendment is that a state may erect any barrier it pleases to the entry of intoxicating liquors. Further, if a state chooses not to exercise the power given by the Twenty-first Amendment, then it is said that the operation of the commerce clause continues, but if the state exercises this power, then the commerce clause is subordinate to the exercise of the state's power under the Twenty-first Amendment. The Sherman law, which was in issue, was thus held to have no greater potency than the commerce clause itself, as the law derived its authority

from the commerce clause which yields to state power drawn from the Twenty-first Amendment.

In *United States v. Maryland State Licensed Beverage Association*, 138 F. Supp. 685, reversed on other grounds, 240 F. (2d) 420, it was held that valid legislation by a state under the Twenty-first Amendment is paramount to conflicting legislation under the commerce clause. Public Law 86-272 relates directly to the commerce clause and therefore must yield to the state's power under the Twenty-first Amendment. Appellee therefore respectfully submits that the appeal of the Appellant should be dismissed as no substantial question not previously decided by this Court is presented in this case.

### CONCLUSION

#### C.

Appellee respectfully submits that the appeal herein should be dismissed on the grounds that the judgment of the Supreme Court of South Carolina rests on an adequate, nonfederal basis and that the questions for which review is sought are so unsubstantial as not to need further argument.

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I hereby acknowledge acceptance of service of Appellee's Motion to Dismiss this .... day of ....., 1972.

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